IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 987

ALABAMA-TENNESSEE NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, CITY OF CORINTH, MISSISSIPPI, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, CITY OF CORINTH, MISSISSIPPI, IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. "A", pp. 1a-10a) is reported at 417 F.2d 511. The opinion and order of the Federal Power Commission (J.A. 103-131) are reported at 38 FPC 1069. The order of the Federal Power Commission denying rehearing (J.A. 132-136) is reported at 39 FPC 97.

JURISDICTION

The judgment of the court below was entered on August 4, 1969 (Pet. App. "B", p. 11a). The court below denied rehearing on September 24, 1969 (Pet. App. "C", p. 12a). The petition for a writ of certiorari was filed on December 22, 1969. The jurisdiction of the court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission acted properly in authorizing a wholesale purchaser of natural gas at termination of its gas purchase contract with its existing supplier to purchase its natural gas requirements from a new supplier at substantially lower cost and without significant detriment to the existing supplier.

STATUTE INVOLVED

The provisions of Section 7 of the Natural Gas Act (15 USC § 717c(b)) are set forth in Appendix D to the petition, pp. 13a to 16a.

STATEMENT

City of Corinth, Mississippi (Corinth), a municipal corporation located in Alcorn County, Mississippi, at a point just south of the Mississippi-Tennessee state line, owns and operates a municipal gas distribution system from which it sells natural gas at retail to consumers located within the corporate limits of Corinth and in an area immediately adjacent thereto (J.A. 2-3). At present, Corinth purchases all of its natural gas requirements from Petitioner under a contract between them which expires February 1, 1970 (J.A. 15, 57-64). Petitioner, in turn, purchases the

natural gas it sells to Corinth from Tennessee Gas Pipeline Company (TGP).

The present contract under which Corinth purchases gas from Petitioner was executed in 1956, and is the last of seven superseding contracts between the parties, all of which have retained an expiration date of February 1, 1970. When the 1956 contract was executed, and repeatedly thereafter, Corinth advised Petitioner that Corinth would not consider an extension of the term of the contract past February 1, 1970, because it intended, at that time, to purchase its requirements directly from TGP (J.A. 4-6).

Although on notice of Corinth's intention to discontinue the purchase of gas from Petitioner on February 1, 1970, Petitioner nevertheless filed, on April 25, 1966, an application with the Federal Power Commission (Commission) for a certificate of public convenience and necessity in which it proposed to construct a new lateral pipeline, paralleling its existing lateral serving Corinth, in order to increase Petitioner's ability to deliver gas to Corinth under maximum daily flow conditions from 5,725 Mcf to approximately 11,500 Mcf (J.A. 77-79, 103-4). Petitioner alleged that the construction of the parallel lateral was necessary to deliver up to 4,700 Mcf per day to Corinth (J.A. 6).

Petitioner's proposal was subject to the condition that Corinth execute a new, superseding contract with Petitioner under which the expiration date of Corinth's obligation to purchase up to 3,850 Mcf per day, the amount stated in the existing contract as the maximum daily delivery, would remain as February 1, 1970, but Corinth's obligation to purchase an additional 850 Mcf per day would extend to November 1, 1985.

Put on notice by Petitioner's conditional certificate application that Petitioner would not deliver in excess of 3,850 Mcf to Corinth[1] and would not undertake construction of facilities to provide up to 4,700 Mcf per day unless Corinth agreed to Petitioner's demands for a new contract with an extension of the term, Corinth took steps to assure an adequate gas supply to its consumers. Corinth filed an application under Section 7(a) of the Natural Gas Act (Act) asking the Commission to direct TGP to connect its facilities with a lateral line to be constructed by Corinth and to sell to Corinth its estimated natural gas requirements in excess of 3,850 Mcf until the expiration of its contract with Petitioner, and at that time to sell to Corinth all of its estimated requirements (J.A. 7-8).

The Commission consolidated for hearing the applications of Corinth and Petitioner. TGP participated in that hearing, taking the position that it would serve Corinth if directed to do so. After hearing, the Presiding Examiner directed TGP to connect its facilities with those of Corinth, and on February 1, 1970, to commence the sale to Corinth of all of its natural gas requirements. The Examiner, however, ruled that until February 1, 1970, Corinth should purchase from Petitioner, and it should supply, all of Corinth's requirements (J.A. 91-97). The Examiner denied Petitioner's application for construction of a lateral paralleling its existing lateral; instead, authorizing Petitioner to loop a segment of the existing lateral which would provide sufficient capacity until February 1, 1970 for the sale and delivery to Corinth of its full requirements (J.A. 96-97, 100-2, 105-6).

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[1] Petitioner disavowed any obligation to deliver in excess of 3,850 Mcf per day to Corinth under the contract, although Petitioner had been delivering up to 5,229 Mcf for which Corinth was billed and paid demand and commodity charges (J.A. 49-50, 105).

In limited exceptions to the Examiner's Decision, Corinth acquiesced in the Examiner's ruling that Corinth should purchase all of its requirements from Petitioner until February 1, 1970. In lieu of the construction of looping facilities by Petitioner that would have only a limited useful life, Corinth proposed immediate construction of its connection with TGP over which TGP would deliver for the account of Petitioner the volumes of natural gas that Petitioner could not safely deliver over its existing lateral.

On November 30, 1967, the Commission issued its Opinion No. 534 and accompanying order (J.A. 103-120). The Commission agreed with the Examiner that TGP should be required to connect its facilities with those of Corinth and on February 1, 1970 to commence the sale of gas to Corinth (J.A. 106). The Commission found that the savings to the consumers from Corinth's purchase of natural gas from TGP would be at least $2,000,000 during the 20-year term of the contract with TGP (J.A. 108). The Commission also found that Petitioner's loss of Corinth's load would be more than overcome by normal growth of Petitioner's sales, and that the impact on Petitioner would be negligible (J.A. 108-110). The Commission concurred in Corinth's proposal for "the immediate construction of the proposed lateral from Corinth to TGP which in any event will be needed for service after 1970", since "economic waste inherent in looping" would be avoided and would permit use of existing facilities "to their maximum safe capacity" (J.A. 116). The Commission directed TGP until February 1, 1970, to deliver to Corinth for the account of Petitioner "the volumes of natural gas which exceed the safe capacity of the existing lateral".

On review, Petitioner challenged only the Commission's authorization to TGP to sell natural gas to

Corinth commencing February 1, 1970. The court below affirmed the Commission's opinion and order, holding that (Pet. App. "A", p. 10a)—

> the Commission's orders are supported by substantial evidence and had a plainly rational basis. Its decision as to where the public interest lay was an exercise of regulatory authority entrusted by Congress to its informed judgment.

ARGUMENT

Contrary to the contentions of Petitioner, the decision of the court below does not conflict with any decision of this Court or with decisions of another circuit court of appeals. The court below properly affirmed the Commission's opinion and order as rationally based and supported by substantial evidence. There are no issues that warrant or necessitate review by this Court.

1. In determining that Corinth should be permitted to obtain gas from a new supplier, the Commission found (J.A. 108) that over the 20-year term of the service agreement with TGP, the savings to the consumer from Corinth's purchase of natural gas from TGP would be a minimum of $2,000,000. These admitted substantial savings in purchased gas costs, which will be passed on to Corinth's consumers (J.A. 41-42),[2]

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[2] Petitioner questions whether any benefits will inure to Corinth's customers because, it says, refunds made by Petitioner in the past were not passed on to Corinth's consumers (Pet. p. 12). What Petitioner fails to point out is that in the past Petitioner imposed rate increases upon Corinth which Petitioner collected from Corinth while the Commission investigated the reasonableness of the rate increases. Corinth, however, did not increase its rates to its consumers. When the refunds were made, Corinth, therefore, used the refunds to make needed extensions and improvements to the gas system, thereby avoiding additional bonded indebtedness, which consumers must underwrite in rates. In fact, Corinth at that time

were properly considered by the Commission as an important, if not a controlling, factor in choosing TGP over Petitioner since, as the court of appeals put it in *Alabama-Tennessee Natural Gas Company* v. *FPC*, 359 F. 2d 318, 331, certiorari denied, 385 U.S. 847, the "primary aim" of the Natural Gas Act "was to protect consumers" and the "central principle in the regulation of the natural gas industry around which all rate making revolves is 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption . . . at the lowest possible reasonable rate consistent with the maintenance of adequate service or the public interest.' "

In the court below Petitioner did not contest the sufficiency of the Commission's finding as to the existence or amount of the benefits to Corinth and its customers and that the effect on Petitioner and its remaining customers would be negligible (Pet. App. "A", pp. 8a-9a). Petitioner nevertheless contended, as it continues to contend here (Pet., p. 14), that the Commission failed to give due consideration to the economic effect upon Petitioner and its other customers of the loss of Corinth as a customer. The court below rejected Petitioner's contention (Pet. App. "A", p. 9a). Petitioner has presented absolutely nothing in its petition in support of its rejected contention. There is only the bare, unsupported contention.

2. Equally without merit is Petitioner's bare and unsupported contention (Pet., p. 14) that the Commis-

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expanded service and reduced the bonded indebtedness of the system (J.A. 8). Under these circumstances, no one can fairly say that Corinth's consumers did not realize benefits from the refunds. Indeed they did, and without having their rates increased while Corinth successfully opposed the excessive rate increases before the Commission. *Alabama-Tennessee Natural Gas Company*, FPC Docket No. G-5471, et al., 27 FPC 1180 (1962).

sion failed to give adequate consideration to "reasonable alternatives" proposed by Petitioner under which Petitioner might retain Corinth as a customer while providing Corinth with the benefits it will realize by purchase of gas from TGP. This contention was also urged upon, and was rejected by, the court below (Pet. App. "A", pp. 9a-10a).

As the court of appeals pointed out, on the last day of the hearing, a witness for Petitioner testified that it would not object to the establishment of rate zones on its pipeline system in order to give Corinth a reduction in cost of gas equivalent to that which it would realize by the direct purchase from TGP (Pet. App. "A", p. 10a). No evidence was introduced or sought to be introduced by Petitioner on the subject (Pet. App. "A", p. 10a). Such a change in rate structure, if it could be lawfully made at all (since it smacks of unlawful discrimination), could not be made, the Commission pointed out, without a full-blown rate case with notice and opportunity to intervene to all customers and interested parties not represented in the present case (J.A. 118). This would result in extensive delay which would jeopardize the sufficiency of gas supply to Corinth with no assurance of the outcome of the rate case (J.A. 118; Pet. App. "A", p. 10a). This was no "reasonable alternative", which, the court below agreed, the Commission properly rejected (Pet. App. "A", p. 10a).

3. Petitioner's principal argument (Pet., p. 11) that the Commission's opinion and order revoked Petitioner's certificate of public convenience and necessity and is, therefore, in conflict with this Court's decision in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424 (1947), is merely wishful thinking. Peti-

tioner conceives of its certificate as granting it an exclusive right to sell gas to Corinth for as long as Petitioner is ready, able, and willing to do so, and that, therefore, the Commission's authorization to TGP revokes rights granted by the certificate. As the court of appeals correctly held (Pet. App. "A", pp. 4a-5a), such a conception of the certificate is defeated by Section 7(g) of the Act,[3] which alone suffices to rebut Petitioner's claim of deprivation of monopolistic and perpetual rights of service. In a consistent line of decisions, as far back as 1947, the courts have rejected claims such as Petitioner advances. *Panhandle Eastern Pipe Line Co.* v. *FPC,* CADC, 1948, 169 F. 2d 881, 883, 884, certiorari denied, 335 U.S. 854; *Kentucky Natural Gas Corp.* v. *FPC,* CA 6, 1947, 159 F. 2d 215, 218; *Home Gas Co.* v. *FPC,* CADC 1956, 231 F. 2d 253, certiorari denied, 352 U.S. 831; *Cincinnati Gas & Electric Co.* v. *FPC,* CA 6, 1968, 389 F. 2d 272, certiorari denied, 393 U.S. 826; *Atlantic Seaboard Corp.* v. *FPC,* CA 4, 1968, 397 F. 2d 753. In these cases, the Commission, with court approval, weighing the benefits and detriments, certificated another supplier to displace existing suppliers in whole or in part. The existing suppliers' certificates in all of these cases were, like Petitioner's certificates, permanent, i.e., without time limit. As the court below succinctly put it (Pet. App., p. 5a):

> The Commission could at the termination of a long-term contract require the distributor to continue dealing with the original supplier by refus-

[3] Section 7(g) provides: "Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural gas company."

ing to certificate a substitute supplier if the only alternative gas supply is from another interstate pipeline. This substitution, however, could in no way convert a certificate authorizing sales to a willing customer into a vested right to continue serving a particular customer indefinitely. A certificate of public convenience and necessity is not a grant of a monopolistic position in a particular area.

4. Of no more substance is Petitioner's argument (Pet., pp. 12-13) that there is a conflict between decisions of this Court and of the District of Columbia Circuit on the one hand and of the court below on the applicability of Section 7(b) of the Natural Gas Act[4], pertaining to abandonment of service by a natural gas company. For conflict with this Court, Petitioner relies on *United Gas Pipeline Company* v. *Federal Power Commission,* 385 U.S. 83 (1966). Petitioner's reliance thereon "is ill-founded" (Pet. App. "A", p. 6a). In that case compliance with Section 7(b) was required because United, a natural gas company subject to the Commission's jurisdiction, proposed to abandon interstate facilities which were constructed and operated under a certificate of public convenience and necessity issued by the Commission to United. This Court ruled that United could not abandon jurisdictional facilities without compliance with

[4] Section 7(b) provides that ". . . No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Section 7(b). In the D.C. Circuit cases, relied on by Petitioner (Pet. App. "A", p. 6a), natural gas companies subject to the Commission's jurisdiction were also proposing to abandon interstate certificated facilities.

In the present case Petitioner, the natural gas company to which Section 7(b) is directed, proposed no abandonment of facilities or service. As for Corinth, neither its facilities nor Corinth are subject to the Commission's jurisdiction. Accordingly, the court below properly agreed (Pet. App. "A", pp. 5a-6a) with the Commission that the claim that "a customer seeking a new source of supply is analogous to an abandonment proceeding is a distortion of the purposes of Section 7(b) which is designed to protect the consumer's right to a continuing source of supply" and "is not designed to bind the customer to any given source of supply."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	5
Argument	8
Conclusion	12

TABLE OF CITATIONS

Cases:

American Trucking Associations, Inc. v. *Frisco Transportation Co.*, 358 U.S. 133	10
Atlantic Seaboard Corp. v. *Federal Power Commission*, 397 F. 2d 753	9, 10
Cincinnati Gas & Electric Co. v. *Federal Power Commission*, 389 F. 2d 272, certiorari denied, 393 U.S. 826	9
Home Gas Co. v. *Federal Power Commission*, 231 F. 2d 253, certiorari denied, 352 U.S. 831	9
Kentucky Natural Gas Corp. v. *Federal Power Commission*, 159 F. 2d 215	9
Michigan Consolidated Gas Co. v. *Federal Power Commission*, 283 F. 2d 204, certiorari denied *sub nom. Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 364 U.S. 913	12
Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 169 F. 2d 881, certiorari denied, 335 U.S. 854	9

374-559—70

Cases—Continued Page

Pittsburgh City of, v. *Federal Power Commission*, 237 F. 2d 741 12

Sun Oil Co. v. *Federal Power Commission*, 364 U.S. 170 10

United Gas Pipe Line Co. v. *Federal Power Commission*, 385 U.S. 83 ..... 10, 11

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 10

United States v. *Seatrain Lines, Inc.*, 329 U.S. 424 10

Statute:

Natural Gas Act, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w:

Section 7(a), 15 U.S.C. 717f(a) 2, 6

Section 7(b), 15 U.S.C. 717f(b) 3

Section 7(c), 15 U.S.C. 717f(c) 3

Section 7(e), 15 U.S.C. 717f(e) 4, 7

Section 7(g), 15 U.S.C. 717f(g) 5, 7, 9

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[1] The pagination in the supplemental appendix is the same as in the Joint Appendix (herein "J.A.") filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) affirming the Commission's order was entered on August 4, 1969. A petition for rehearing *en banc* was denied on September 24, 1969 (Pet. App. 12a), and the present petition was filed on December 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, as amended (15 U.S.C. 717r(b)).

QUESTIONS PRESENTED

1. Whether the Commission properly authorized the substitution of a new interstate natural gas supplier for the City of Corinth, Mississippi, which was being served by another interstate pipeline company, after finding that Corinth consumers would be substantially benefited by the change and that the impact on the existing supplier and its other customers would not be significant.

2. Whether the Commission properly refused to require a municipal system to contract for gas with petitioner against the will of the city government and contrary to the best interests of the consumers.

3. Whether a certificate of public convenience and necessity under the Natural Gas Act entitles a pipeline company to continuing freedom from competition for existing and future service.

STATUTE INVOLVED

Section 7 of the Natural Gas Act (15 U.S.C. 717f) provides in relevant part:

> (a) Whenever the Commission, after notice and opportunity for hearing, finds such action

necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion

of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

STATEMENT

Petitioner, an interstate natural gas pipeline company, sells gas to the City of Corinth, Mississippi, which resells it through its local distribution system (Pet. App. 2a; J.A. 62). For some years petitioner has been supplying greater quantities than called for in its existing contract with Corinth, which expires on February 1, 1970 (Pet. App. 2a; J.A. 77–80). Corinth has refused to execute new agreements either enlarging the quantities in the contract or extending the expiration date of the present contract (Pet. App. 2a; J.A. 79, 91). Petitioner now receives its entire gas supply from Tennessee Gas Pipeline Company at a point a short distance from Corinth, and carries it 3 miles through its system and then to Corinth through a 2.5-mile, 3.5-inch lateral pipeline, which is no longer adequate to meet the increased requirements of Corinth (Pet. App. 2a; J.A. 47).

The present proceedings were commenced when petitioner applied to the Commission for a certificate of public convenience and necessity authorizing construction of another 2.5-mile, 3.5-inch pipeline, paralleling the one already serving the city, on condition that Corinth be required to contract to purchase increased quantities of natural gas from it for an extended period (Pet. App. 2a–3a). The cost of the proposed facilities